Top 10 Litigation Risk Assessment Tips for 2013

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Is Managing Risk of Litigation Part of Your Portfolio?

• The first question is not whether a lawsuit will occur.
• The first question is how are you managing the risk of litigation?
• Have you identified your risks?
Anticipating and preparing are key to mitigating the risks associated with defending lawsuits.

- Focus on the whole enterprise
- Align litigation and business strategies
- Ascertain your enterprise’s business and litigation tensions
- Are your litigation processes transparent?
Enterprise Level: Know Your Metrics

• Management requires measurement:
  – Identify quantifiable metrics
  – Establish measurable data points
  – Develop analytical procedures that ferret out and measure the correlations between prevention strategies and the occurrence and cost of litigation
Enterprise Level: Plan to Avoid Litigation

- What is the role of governance, risk management and compliance?
- Consider an internal alternative dispute resolution program to help keep conflicts at bay
- Know the business risks that will give rise to litigation
Enterprise: Create Business Intelligence Around Litigation and the Risk of Litigation

- Identify the types of liability that may lead to lawsuits against the company
- Determine the frequency with which lawsuits for each type of liability are brought against companies in the industry
- Identify the zone of information, documents, witnesses, business units, etc. related to the litigation risks
- Make sure litigation hold process is intact, defensible and repeatable
Enterprise: Make Sure Your Clients and/or Business Units Are Allies

- Educate business people before litigation
- Get your document ducks in a row
- Work with a clear understanding of privilege issues
- Develop a preventive cycle:
  - Look for patterns
  - Quickly institute corrective measures
  - Keep training and policies up-to-date
Cases: Manage Your Litigation From A Risk Perspective

- Use litigation risk assessment as the framework to manage your case and docket
- Design your litigation strategy by identifying goals first and then design a course of action to achieve those goals
- Understand all aspects of the corporation’s interests (“zone of costs”) as they relate to the lawsuit(s)
Cases: Formulate and Implement an Intentional Strategy

• Develop decision tree based on the nature of the case. What are you dealing with:
  – Routine and low risk
  – Routine and high risk
  – Repetitive
  – High risk or complex cases
  – Corporate principle cases
Cases: Don’t Leave Home Without It

• Except for routine low risk cases – the initial assessment of a case is critical and should cover:
  – The legal and factual strengths of the case
  – Preliminary outline of strategy
  – Desired outcomes/objectives of defense

• After discovery and after any major development (such as the win or loss of a major motion), re-assess strengths and weaknesses

• Track significant milestones and adjust as needed
Cases: Use the Case Assessment as a Decision-Making Guide

- A sound and thorough case assessment provides critical information needed to make informed and sound decisions at multiple levels:
  - Which path should the company pursue? Trial vs. settlement vs. ADR
  - How much should the company be willing to spend to attain a final judgment?
  - Will a loss or settlement restart the clock?
  - How critical is the outcome of a particular uncertain issue to the total outcome of the case?
Cases: Use the Case Assessment as Guide to Successful and Efficient Discovery

- Know your enterprise and case strategies prior to searching for information and documents to:
  - Formulate an efficient upfront search strategy
  - Define the roles of in-house counsel and outside counsel
  - Achieve consistency across your matters by design
  - Develop a witness/document tree
  - Develop an effective review workflow
  - Create a privilege review process and workflow